INSTRUCTIONS IN THE DAINGERFIELD WILL CASE.

TESTAMENTARY CAPACITY—UNDUE INFLUENCE.

We are fortunate in being able to lay before our readers the subjoined instructions given by the court in the Daingerfield will case, recently tried in the Circuit Court of Alexandria, before Judge C. E. Nicol. The amount involved was large, the questions nice, and both sides were represented by eminent counsel. We hope members of the bar may find these instructions valuable for reference. Many of them are fortified by the citation of authorities, which give the collection an added value. The issue was *devisavit vel non*, and the contest was made upon the alleged lack of testamentary capacity and undue influence exercised upon the testatrix.

Eppa Hunton, Jr., and John M. Johnson, represented the proponents—and R. Walton Moore, Edmund Burke and Samuel G. Brent, the contestants.

It is scarcely necessary to add that neither court nor counsel is responsible for the italicized catch-lines.

The following instruction was prepared and given by the court *ex mero motu:*

Undue influence—What influence legitimate.—The court instructs the jury that to make a good will the testatrix must be a free agent, but all influences are not unlawful; appeals to the affection, or ties of kindred, to gratitude for past services, or pity for future destitution, or the like, are all legitimate and may be fairly urged on the testatrix.

On the other hand, pressure of whatever charactor, if so exerted as to overpower the volition, without convincing the judgment, is a species of restraint, under which no valid will can be made.

Importunity which the testratrix has not the will or strength to resist, and to which she yields for peace and quiet, if carried to a degree in which the testatrix's judgment, discretion, or wish is overborne, will constitute undue influence, though no force is used or threatened. In other words, her will must be the offspring of her own volition, and not the record of the wishes and desires of some one else; and in considering whether the testatrix's free volition had been overborne or controlled, the jury must consider her age, her physical and mental condition, and all the circumstances surrounding the testatrix. *Chappell* v. *Trent*, 90 Va. 849, 933.

The following instructions were given for the proponents:

1.

Right to discriminate amongst kindred.—The court instructs the jury that every person possessing testamentary capacity is entitled, under the laws, to make a will, and to dispose of his property as he pleases, and to discriminate between next of kin as he may choose.

2.

Test of testamentary capacity.—The court instructs the jury that every person is of testamentary capacity who is capable of knowing and understanding the nature of the business he is engaged in, and the elements of which the will is composed, and the disposition of his property, as therein provided for, both as to the property he means to dispose of by his will, and the persons to whom he means to give or convey it, and the manner in which it is to be distributed among them. *Parramore* v. *Taylor*, 11 Gratt. 233.

3.

Effect of old age and impaired intellect.—That neither sickness, old age, nor impaired intellect, even if the jury believe from the evidence that any or all of them existed in the case, are sufficient to render void the provisions of said paper, or any of them; if the jury also believe from the evidence that the testatrix, at the time of executing the said will, was capable of recollecting what property she was about to dispose of, the manner of distributing it, and the objects of her bounty, then they must find that she had legal capacity to make a valid disposition of her property. *Tucker* v. *Sandidge*, 85 Va. 555.

4.

Undue influence—Burden of proof.—The court further instructs the jury that undue influence (which is a species of fraud) must not be presumed, but must be clearly and strictly proved, and the burden of proving it rests upon him who alleges it; but if undue influence is proved by evidence, the burden of repelling such undue influence by evidence is on the plaintiffs in this case; in other words, the burden of proof in this case lies on the plaintiffs to satisfy the jury by evidence that the instrument propounded is the last will of a free and capable testatrix. *Riddell* v. *Johnson*, 26 Gratt. 152; *Hartman* v. *Strickler*, 82 Va. 226.

5.

If capacity exists, unreasonable disposition of property does not affect validity.—If the jury believe from the evidence that Eliza R. Daingerfield, at the time she executed the will dated October 20, 1895, the will in controversy, had sufficient understanding to clearly comprehend the nature of the business, and consented freely to the same; that no undue influence was used to bring it about, then the validity of said will cannot be impeached, however unreasonable or unaccountable it may seem to others, as the propriety of such disposition is not to be decided by them, but her capacity to made it. *Hartman* v. *Strickler*, 82 Va. 225; *Orr* v. *Pennington*, 93 Va. 272.

6

Declarations in will as evidence of capacity.—The court instructs the jury that the declaration contained in the will of Eliza R. Daingerfield, deceased, that the contestants, the widow and children of her son Henry, who do not participate equally

with the widow and children of her other deceased son, Reverdy J., in the disposition of her estate thereunder; that the said widow and children of her son Henry are comfortably provided for, must have great weight with them in determining that her will was her free and voluntary act, and not procured by undue influence, provided that they believe from the evidence that they are so comfortably provided for, and that the said Eliza R. Daingerfield, at the time of her executing said will, had sufficient testamentary capacity. *Greer* v. *Greer*, 9 Gratt. 330; *Riddell* v. *Johnson*, 26 Gratt. 155.

7.

Reasons assigned by testatrix for similar disposition by former will, as evidence of capacity.—If the jury believe from the evidence that Eliza R. Daingerfield's disposition of her estate, by the will in controversy, is in accord with her previous declarations and affections, then the court instructs them that this is itself persuasive evidence of testamentary capacity.

And further, if the jury believe from the evidence that Eliza R. Daingerfield, prior to, at the time of, and subsequent to the execution of the first will, which was prepared by Judge J. K. M. Norton, declared to her sisters and others that she intended or had left her property to the widow and children of her deceased son Reverdy, because their fathar had lost all or nearly all of his estate left him or derived from his father, and that the widow and children of her deceased son Henry had what their father left them, which was all the property left or derived from his father, and because the children of her son Reverdy were girls, and that the children of her other son Henry were boys, who could look out for themselves, and that the single daughter of her said son Henry and his widow had relatives who would never see them want, and that his boys would be helped by their relatives, and that the widow and children of her son Reverdy had no one to look to but herself, and that she must provide for them, is, and must be, a controlling influence on the question of undue influence and show that the said disposition was her free act, provided they believe from the evidence that the will now being contested contains substantially the same disposition of her property as the first will did, and that at the time she executed the will now being contested she had testamentary capacity. 27 Am. & Eng. Encyc. Law, 503; *Key* v. *Holmes*, 84 Me. 219.

8.

Mere discrimination between next of kin, no evidence of undue influence.—The court instructs the jury that discrimination between next of kin of the same degree, or the entire exclusion of a part or all of them, does not of itself, and standing alone, authorize an inference that such a discrimination was the result of undue influence, although the jury believe from the evidence that there is discrimination between the widow and children of Reverdy J. Daingerfield and the widow and children of Henry Daingerfield, in the will of the said Eliza R. Daingerfield, still they cannot infer from such fact, of itself and standing alone, undue influence, or that said will was not her free act. *Key* v. *Holmes*, 84 Me. 219.

9.

Attesting witness—Weight to which testimony entitled.—The court instructs the jury that the attesting witnesses to a will are regarded in law as placed around the testator to guard against fraud, and to ascertain and to judge of his capacity, and

their testimony is entitled to peculiar weight. *Crandall's Appeal* (Conn.), 38 Am. St. Rep. 375.

10.

Attending physician—Weight to which testimony entitled.—The court instructs the jury that physicians are considered as occupying a high grade as witnesses as to testamentary capacity, especially a physician who has attended the patient through or during the period in which his mind is alleged to have become impaired or disabled. *Young* v. *Barner*, 27 Gratt. 96; *Tucker* v. *Sandidge*, 85 Va. 571.

11.

Discrimination amongst next of kin, on mistaken belief.—If the jury believe from the evidence that Mrs. Eliza R. Daingerfield, at the time of executing the will in controversy, believed that her son Reverdy had spent all of his property or estate, and that she was mistaken in this belief, such mistake on her part does not affect the validity of her will, although this belief operated in part to cause her to dispose of her property as in said will, provided the jury believe from the evidence that the testatrix had testamentary capacity, as described in instruction number 2, granted on behalf of the plaintiffs, at the time of executing said will, and was not subjected to such undue influence as she was incapable of resisting. *Burton* v. *Scott*, 3 Rand. 399; *Parramore* v. *Taylor*, 11 Gratt. 233; *Simmerman* v. *Songer*, 29 Gratt. 24; *Cheatham* v. *Hatcher*, 30 Gratt. 56, 65.

12.

Test of sane mind—Powers of recollection.—The court further instructs the jury that every person who is capable of recollecting the property he is to dispose of, the manner of distributing it, and the objects of his bounty, is of sound mind. *Tucker* v. *Sandidge*, 85 Va. 546, 555.

13.

Family physician—Weight to which testimony entitled.—The court instructs the jury that the opinion on a question of sanity of one who has been the family physician, and attended the testatrix during fourteen years up to and including her last illness, is entitled to great and peculiar weight. *Montague* v. *Allan*, 78 Va. 592.

The following were given for the *contestants:*

1.

Devisavit vel non—Burden of proof.—It is the duty of Effie Daingerfield and her co-plaintiffs to establish to the satisfaction of the jury, not only that the will in question was executed with the formalities required by the statute, but also that, at the time it was executed, Eliza R. Daingerfield was of sound and disposing mind and memory—not only that the instrument was in writing, and signed by the said Eliza R. Daingerfield, and attested in her presence by subscribing witnesses, but also that it was executed by one who understood its contents and was capable of being a testatrix—by one to whom the statute had given the right of making a disposition of property by will. And otherwise, the verdict must be against the will.

2

Testamentary capacity—Test.—The will cannot be sustained unless the jury believe from the evidence the testatrix at the time of its execution understood its contents, and had sufficient mind and memory to be capable of making a testamentary disposition of her property with sense and judgment in reference to the situation and amount of such property, and the relative claims of the different persons who are, or might be, the objects of her bounty. Unless the testatrix thus understood, and was capable, the verdict must be against the will, even though the jury may believe from the evidence that she was capable of undertaking and conducting other transactions.

3

Circumstantial evidence sufficient to overthrow will.—Direct proof is not necessary to overthrow a will, but any facts and circumstances are sufficient as evidence that satisfy the jury of the incapacity of the testatrix to make a testamentary disposition of her property at the time of the execution of the will.

4

Will contrary to natural justice—Power of jury.—The jury must consider the nature and character of the will, and if they find from the evidence that it is contrary to natural justice, they shall give this fact such consideration as they may deem proper in determing the question of the testatrix's capacity.

5

Will disregarding claims of near relationship.—In determining the question of the testatrix's capacity, the jury are at liberty to consider whether the claims of near relationship have been disregarded; and if they find from the will and the evidence that such claims have been disregarded, they may consider that fact in connection with other facts and circumstances of the case, and give it such weight as in their sound judgment and discretion they shall think it entitled to.

6.

Failure of memory, as evidence of incapacity.—It is essential to the making of a valid will that the testatrix shall, at the time of its execution, be of disposing mind and memory. Failure of memory, if the jury find it to have existed, may be considered in connection with all the other facts and circumstances of the case in determining the testatrix's capacity, and shall have such weight as the jury, in the exercise of their sound judgment and discretion, may think it entitled to.

7.

Testatrix changiny spelling of her name, as evidence of loss of memory.—If the jury shall believe from the evidence that the testatrix, in signing her first name, spelled it one way up to October, 1895, and thereafter in signing said first name spelled it in another way, they may take that circumstance into consideration in determining the question of the impairment or loss of memory of the testatrix, and her capacity to execute the will in issue.

8.

Misnaming grandchildren, whose names were well known to testatrix, as evidence of incapacity.—If the jury shall believe from the evidence and the said will itself

that the testatrix misnamed certain of her grandchildren, whose names had been well and familiarly known to her, they may take such fact into consideration and give it such weight as they may think proper in considering the question of the capacity of the testatrix.

9.

Testatrix attempting by will to dispose of property not belonging to her, as evidence of mental impairment.—If the jury shall believe from the evidence that the testatrix in one or more of the provisions of the will undertook to dispose of articles of personal property not owned by her, the jury may take that circumstance into consideration, and may, if they think proper from the evidence, infer therefrom the existence of a state of mind of the testatrix unfavorable to the making of a valid will at the time of the execution of the said will.

10.

Incapacity to appreciate relations to others who are proper objects of testatrix's bounty—Affections poisoned by mental disorder.—It is essential to the exercise of the power to make a will that the person making it be able to comprehend and appreciate her relations to others who might, or ought to be, the objects of her bounty, and that no disorder of the mind shall have so far impaired the mind or poisoned her affections, perverted her sense of right, or prevented the exercise of her natural faculties as to render her incapable of such comprehension and appreciation, and bring about a disposal of her property which, if her mind had been otherwise, would not have been made.

11.

Undue influence—Importunity which cannot be resisted.—In order to make a good will, the testatrix must have been not only a capable, but a free agent. Pressure of whatever character, if so exerted as to overpower the volition without convincing the judgment, is a species of restraint under which no valid will can be made. Importunity which the testatrix has not the strength to resist, and to which she yields for peace and quiet, if carried to a degree in which the testatrix's judgment, discretion, or wish is overborne, will constitute undue influence, although no force is used or threatened. In other words, the will must be the offspring of the testatrix's own volition, and not the record of the wishes and desires of others, and in determining whether the testatrix's volition was overborne or controlled, the jury must consider her age, her mental and physical condition, and all the circumstances surrounding her at the time the will was executed, and should they believe from the evidence that the will was the product of undue influence, their verdict must be against it.

12.

Undue influence previously exerted—Continuing at time will is executed.—While undue influence which operates to defeat a will must be such as to overcome the free action of the mind at the time of the execution thereof, yet it is also true that the pressure may sometimes have been brought previously. If pressure, constituting undue influence, has been brought previously, and remains so as to unduly influence the mind of testatrix at the time of the execution of the will, the will cannot be upheld.

13.

Incapacity—Old age—Morbid delusions Abnormal nervousness.—If the jury shall believe from the evidence that the testatrix, at the time of making her will, was an

old woman, that her nervous system had become more than ordinarily sensitive, that she was apprehensive that the mother of contestants would do her some injury, that such an apprehension was an unfounded and morbid delusion, such as to destroy her testamentary capacity, and that the will was the result or offspring thereof, then the jury shall find against the will. 109 Mich. 98.

14.

Incapacity—Prejudice against kinswoman without cause, amounting to monomania.—If the jury shall believe from the evidence that at the time of making the will the testatrix was laboring under a prejudice towards her daughter-in-law, Virginia Daingerfield, without cause, which was a monomania, and that the will was the direct offspring of such prejudice, then the jury must find against the will, even though the general capacity of the testatrix to do ordinary business be unimpeached, provided such monomania so affected the testatrix in the making of the will as to render her of unsound mind ir that particular; but the jury are further instructed that if they believe from the evidence the testatrix had testamentary capacity at the time of making the said will, and was not controlled by such unfounded delusion or monomania, she had the right to disinherit said Virginia Daingerfield and her children with or without cause, as it pleased her. 109 Mich. 98.

15.

Undue influence—Proof by facts and circumstances, each in itself trivial.—Proof of undue influence must, in most instances, be made out, if at all, by proof of facts and circumstances. Such facts and circumstances, standing alone, may be trivial, but when taken together are sufficient, if they satisfy the jury that the will was procured by undue influence.

16

Evidence of undue influence—Physical and mental impairment of testatrix—Leading secluded life—Close association with proponents—Exclusion of grandchildren in favor of stranger to her blood—Burden of proof.—If the jury shall believe from the evidence that the testatrix was a woman of advanced age; that she was physically and mentally impaired at the time of the execution of the will; that she lived a life of great seclusion; that she was in constant association with the legatees to whom she has mainly given her estate, and that they had much infleunce with her; and if they shall further believe that a large part of her estate, by the terms of the will, goes to a stranger to the testatrix's blood, to the exclusion of her grandchildren, who are defendants in this cause, then it is incumbent upon the plaintiffs who claim under the will to satisfy the jury by a preponderance of proof that the will was the free and voluntary act of the testatrix, and the intelligent expression of her wishes respecting the disposition of her property. And if the jury be not so satisfied, their verdict must be against the will. *Whitelaw* v. *Sims*, 90 Va. 588.

17.

Injustice of will, as evidence of incapacity.—While a person is not to be regarded of unsound mind simply because the provisions of her will may be unjust, yet if the jury, from the will and the evidence, find them to be unjust, in view of the claims that her grandchildren may have had upon her, the jury have a right to consider this fact in connection with all the other facts and circumstances of the case in determining whether or not the testatrix was of unsound mind.

18.

Undue influence—Amount varies with weakness or strength of testator's mind.—The amount of undue influence sufficient to invalidate a will may vary with the strength or weakness of mind of the person making it. The influence which would subdue or control a mind unimpaired by age, disease, or other cause, might subdue or control a mind thus impaired, even though the mind had not become so impaired as to render the person incapable of a testamentary act, free from such undue influence.

19.

Undue influence—General principle stated.—The question as to what is undue influence depends largely upon the circumstances of each case, chief of which are the dispositions contained in the will, the situation of the person making it, the mental and physical condition at the time of making it. And if the jury shall believe from the evidence that influence which the testatrix was incapable of resisting was successfully employed to induce the testatrix to make an unequal disposition of her property, or disregard the ties of blood without sufficient cause, it should be viewed as illegitimate, and treated as undue, and if the jury entertain such belief they shall find against the will.

20.

Undue influence—Jury to consider all surrounding facts and circumstances.—The jury, in determining whether there was undue influence, must consider the age and the physical and mental condition of the testatrix, all the circumstances by which she was surrounded, including the condition, character and conduct of the persons around her, her family relations, the extent and nature of her estate, and the dispositions of the will.

21.

Undue influence—May exist where testatrix is otherwise capable.—Even though the jury may believe from the evidence that the testatrix was mentally capable of making a will, yet in determining whether the will in question was procured by undue influence, the jury must consider any evidence showing, or tending to show, that at the time of the execution of the will her faculties had become so weakened by age, disease, or other cause, as to render her more subject to undue influence than she otherwise would have been.

22.

Undue influence—Favored by morbid prejudice against contestants.—Even though the jury may believe that the testatrix was mentally capable of executing a will, yet in determining the question of undue influence, they should consider any evidence showing, or tending to show, that her mind was weakened or perverted by morbid and unreasonable prejudice towards her daughter-in-law, Virginia Daingerfield, so as to render her more subject to undue influence than she otherwise would have been.

23.

Undue influence—exerted by one of several legatees.—The court instructs the jury that if they shall believe from the evidence that the said paper writing was procured by undue influence exercised upon the mind of the testatrix, they shall find against the will, notwithstanding the fact that such undue influence was practiced or exerted by only one of the legatees mentioned in said paper writing.

24.

Undue influence—Contestants' hypothesis—General instruction.—If the jury shall believe from the evidence that Eliza R. Daingerfield, the testatrix, in 1883, made a will by which she left her property equally to her two sons; that the said will remained unrevoked until after the death of her son Henry, in 1894; that she had then become seventy-four years of age; that she had become impaired physically and mentally; that after the death of her said son Henry she conceived an extreme and bitter dislike for his widow without cause on her part; that this dislike was fostered by the plaintiffs or some of them; that there was no good reason or cause whatever for this dislike; that she became more and more estranged from her said daughter-in-law, the widow of said Henry Daingerfield, without cause on the part of said daughter-in-law; that she came into closer and more constant association with the plaintiffs; that the plaintiffs stood in relations of confidence and dependence towards her, the said Eliza R. Daingerfield; and if they shall further believe from the evidence that being so situated the said Eliza R. Daingerfield executed the will which is in controversy in this case on a mistaken and unfounded belief, established by undue influence, that Reverdy Daingerfield's family would otherwise be unprovided for, then the court instructs the jury that there is a violent presumption that the said will was procured by undue influence, and that such presumption must be overcome by satisfactory testimony before the said will can be sustained as the last will and testament of the said Eliza R. Daingerfield. *Hartman* v. *Strickler*, 82 Va. 225; *Whitelaw* v. *Sims*, 90 Va. 588.

25.

Attesting witnesses—Attending physician—Weight to which testimony entitled.—In determining the weight to be given the attesting witnesses and the attending physician, the jury must consider what opportunities such persons had to know the testatrix, and to ascertain her mental condition. However, this instruction is to be read and considered by the jury in connection with instructions numbers nine and ten granted in behalf of plaintiffs.

The following authorities were relied upon to support the contestants' instructions:

Hartman v. *Strickler*, 82 Va. 225.
Simmerman v. *Songer*, 29 Gratt. 9.
Parramore v. *Taylor*, 11 Gratt. 220.
Riddell v. *Johnson*, 26 Gratt. 152.
Montague v. *Allan*, 78 Va. 593.
Cheatham v. *Hatcher*, 30 Gratt. 56.
Lambert v. *Cooper*, 29 Gratt. 61.
Miller v. *Rutledge*, 82 Va. 863.
Walters v. *Walters*, 89 Va. 849.
Chapell v. *Trent*, 90 Va. 849.
Whitelaw v. *Sims*, 90 Va. 588.
Orr v. *Pennington*, 93 Va. 268.
Dale v. *Dale*, 11 N. J. Eq. 38.
Reynolds v. *Adams*, 90 Ill. 134.
Drake's Appeal, 45 Conn. 9.
Greenwood v. *Kline*, 7 Oregon, 17.
Dale's Appeal, 57 Conn. 143.
Watterson v. *Watterson*, 1 Head, 1.
Rivard v. *Rivard*, 109 Mich. 98.
Haines v. *Hayden*, 95 Mich. 332.
Tucker v. *Sandidge*, 85 Va. 555.
Jarman on Wills (5 Am. Ed.) 66 & 133.